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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 111

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

Petitioner,

against

ALLTEX PRODUCTS CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Attorney for Respondent.

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SUBJECT INDEX.

PAGE

STATEMENT OF THE CASE 1

THE DISTRICT COURT'S APPLICATION OF THE LAW 7

THE OPINION OF THE CIRCUIT COURT OF APPEALS 9

SUMMARY OF ARGUMENT 11

ARGUMENT 12

1. *Armstrong* v. *Nu-Enamel*, 305 U. S. 315, is inapplicable because of the Finding of Fact by the trial court of the absence of secondary meaning of "brake block," the disputed term, affirmed by the appellate court which found adequate proof in the record to sustain the trial court's Finding 12

2. Whether defendant had been guilty of unfair competition in any form *dehors* a trademark was a contested factual issue which the court resolved in defendant's favor. There was ample proof to justify this finding. Hence certiorari will not lie to review the trial court's discretion 15

CONCLUSION 18

Table of Cases Cited.

PAGE

Armstrong Paint & Varnish Works v. Nu-Enamel Corporation, 305 U. S. 315 .....2, 8, 12, 14, 18
Du Pont Cellophane Co. v. Waxed Products Co., 85 F. (2) 75; cert. ded., 299 U. S. 601 15
Fawcett Publications v. Popular Mechanics, 80 F. (2) 194 15
Germanow v. Standard, 283 N. Y. 1 12
Kellogg Co. v. National Biscuit Co., 305 U. S. 111..12, 13, 14
Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co., 235 F. 657 15
McGraw-Hill Publishing Co. v. American Aviation Associates, 117 F. (2) 293 15
Prestonettes v. Coty, 264 U. S. 359 15
Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446 15
Steem-Electric Corp. v. Herzfeld, 118 F. (2) 122..12, 15

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Statement of the Case.

Petitioner's papers in the main discuss the evidence favorable to it and completely ignore defendant's counter-evidence. However, a comprehensive statement of the case is hardly necessary in view of the reproduction *in extenso* of the summations and arguments of counsel at the conclusion of the trial before District Judge Woolsey (R. 1429-1514), and the opinion of Senior Circuit Judge Learned Hand (R. 2086-2090).

Suffice it to say that the critical question of secondary meaning of the term "brake block" *simpliciter*, as contradistinguished from plaintiff's trademark "American Brakeblok", and the equally crucial issue of common law unfair competition, were thoroughly litigated before the trial court. There was no concession by respondent of

secondary meaning, as in *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corporation,* 305 U. S., 315, upon which petitioner predicates its application. Directly contrary to the factual basis upon which *Armstrong* v. *Nu-Enamel, supra,* was adjudicated by this Court, at bar the Court found on conflicting evidence that secondary meaning of "brake block" had not been established (R. 29-30), and further (Findings of Fact, R. 29):

> "8. The defendant has not been proved to have been guilty of any other form of unfair competition, whether by imitating plaintiff's packages, labels, or otherwise".

The trial court did not imply that defendant had been guilty of unfair competition in some form. Its use of the phrase "any other form" has reference to the Finding of Fact immediately preceding, wherein the Court stated that the entire question centers about the use by the defendant of the words "National Brake Block". The Court meant that the proof was devoid of anything which smacked of unfair competition except possibly the employment of the name "National Brake Block", and the trial court then went on to state its Conclusions of Law leading to its determination that "National Brake Block" as the name of defendant's product was not unfair competition.

The Court found that "'American Brakeblok' is a descriptive trade-mark, for the words 'brake blok' are merely two old words, which in this particular instance are united as one, with the last word misspelled apparently in a clumsy effort to achieve a fanciful name," (Finding of Fact No. 3, R. 29). Apparently petitioner raises no question that there was ample evidence in the record to sustain this finding. The trial court also found that "a brake block is a descriptive word which has long

been and still is in use in the automotive trade as such for products such as both parties to this cause make," (R. 30).

While an express finding of the absence of secondary meaning as to "brake block" *simpliciter* does not appear in the record in *haec verba*, a reading of the entire proceedings will make it immediately apparent that this was the chief issue litigated upon the trial and that most of the evidence adduced on both sides was directed to that very point (R. 461, 1017-1018, 1433, 1452, 1453-1454, 1473, 1477-1478, 1479, 1501, 1503). As Judge Learned Hand said below (2088):

> "* * * Upon this evidence the judge found that the whole phrase, 'American Brakeblok,' had acquired a secondary meaning * * * but he did not find, as the plaintiff insists that he should have done, that the words 'brake block' alone had a secondary meaning. * * *
>
> "We should scarcely feel justified in holding 'clearly erroneous' an express finding made on such a record that the plaintiff had not established any secondary meaning for the words 'brake block,' and in spite of the absence of an express finding we think that the judge's disposition of the case implied the equivalent of such a finding."

To meet plaintiff's contention that "brake block" was the "nickname" of its product and to demonstrate that it was generally in use as a common appellative of brake friction material, by a plethora of evidence defendant established, *inter alia*:

(1) That the word "brake block" is an old dictionary common noun employed to designate a part of the brake mechanism of a horse-drawn vehicle which exactly corresponds in function, utility and character with the auto-

mobile brake friction material to which the term "brake block" is applied in modern times.

(2) That the term "brake block" has been used for many years by a great many brake friction material manufacturers and dealers to designate their products when made of comparatively dense and rigid molded material, however thick it may be.

(3) That among automobile mechanics "brake block" is used interchangeably with "brake lining" to denominate a piece of brake friction material taken by passenger automobiles as well as by trucks (R. 1225, 1227, 1228, 1242, 1249, 1252, 1257, 1262, 1269, 1271-1272, 1634; Deft. Exs. UUU, VVV, WWW, XXX).

(4) That plaintiff itself throughout recognized the general usage of "brake block" as a common appellative of anyone's brake friction material, as the result of which plaintiff iniated an advertising campaign to educate the public to call for "*American* Brakeblok" so that they might receive the plaintiff's brand of brake block and no one else's (Deft. Exs. I and J; R. 1934, 1935; Deft. Exs. K; R. 1936; R. 2088).

(5) That in plaintiff's very application for a trademark, which was unsuccessfully attempted under the Act of 1905 and then withdrawn and submitted under the Act of 1920, plaintiff's own attorney stated that the goods upon which the trademark was to be placed, were not brake linings because "they are not made of fabric like belting and hose" (Deft. Ex. H; R. 1933).

In that same document plaintiff's attorney represented to the Commissioner of Patents that: "The goods are made of composition sometimes in the form of short bloks [(sic)] and sometimes in the form of long bloks

[(sic)] which are used in place of what is commonly known as brake linings and are distinguished therefrom because brake linings are made of fabric." (It will be noted that nothing is said in Defendant's Exhibit H; R. 1933, to the same or similar effect as that now urged by petitioner, namely, that "brake block" is the term denoting brake friction material for trucks but not for passenger automobiles).

(6) By a series of patent applications introduced in evidence by defendant it was shown that "brake block" was used as a common appellative for brake friction material, indiscriminately applied to light vehicles, heavy ones, commercial vehicles, pleasure cars, etc. A number of these patents were those of plaintiff's own officers including plaintiff's president who was its main witness upon this trial. (R. 1938, 1939, 1940, 1943, 1946, 1949, 1951, 1954, 1957, 1960, 1963, 1966, 1969, 1978).

(7) That plaintiff was guilty of a deliberate attempt to deceive this trial court with respect to the terms of settlement of a similar suit against another alleged infringer in the Federal Court of Chicago a short time prior to the trial of this action. This was the stratagem: After the trial of that action the Court reserved decision pending the submission of briefs, whereupon a formal stipulation was drawn by plaintiff and the other alleged infringer in Chicago (Pl. Ex. 134, R. 1923). This purported to be the sole agreement of settlement. That formal stipulation was vouched for by plaintiff's counsel upon the trial of this action before Judge Woolsey as "the contract and it speaks for itself" (R. 1410). But when we interrogated plaintiff's president as to whether there was some secret consideration paid by plaintiff,—not knowing that there was but suspecting that there might have been,—we were astounded, as undoubtedly was the Court, when plaintiff's

counsel interposed a technical objection, seeking to avoid a disclosure (R. 1410). The objection overruled, reluctantly plaintiff's president admitted that at the same time the formal contract was prepared, when this trial was in the offing, there was a collateral writing which in several vital respects virtually emasculated the corresponding provisions of this formal contract which plaintiff's counsel insisted "spoke for itself".

For example, the contract did not speak of any moneys paid to the alleged infringer and it was so drawn as inevitably to lead to the conclusion that nothing was paid by plaintiff. The collateral writing, however, prepared simultaneously therewith, which plaintiff would not have "speak for itself" upon the trial, provided for the payment of $5,500.00 in cash to the "infringer" with promise of an additional $1,000.00 under stated conditions.

For example, also, the formal contract contained an unqualified recognition by that "infringer" of plaintiff's right to the exclusive use of "brake block" and the infringer's solemn undertaking to refrain until eternity from using that name,—but the collateral writing grants the "infringer" the absolute right to employ the term "brake block" in the event of a determination adverse to this plaintiff in future litigation with some other "infringer".

This "unclean hands" letter which plaintiff sought to suppress was introduced in evidence as Defendant's Exhibit BBBB, (R. 2082). Plaintiff's president was so embarrassed when the letter was finally produced that he made the following answer (R. 1412):

> "Q. This letter that was just produced here was written the very same day of the agreement? A. I can't help it. I didn't sign the letter".

(8) That except in instances so rare as to be inconsequential, the automobile owner does not ask for any par-

ticular brand of brake friction material but instead contracts for the service of relining his brakes for one composite charge only a small part of which is allocated to the cost of the material, the greater portion being the labor charge. Further, once the brake friction material is applied to the automobile, and applied it invariably is while the automobile owner has gone about his business elsewhere, it is concealed from view and the use of whatever name may be applied to the material does not and cannot mislead or deceive, (R. 2090).

(9) That the abbreviation most commonly employed is the first name of the dealer, such as "American", "National", "Thermoid", "Emsco", "Gatke", "Raybestos" or "Ferodo",—not "brake block" as plaintiff contended, (R. 1254, 1255, 1256, 1257, 1259, 1268, 1281).

The trial court commented upon this phase of the proof as follows (R. 1453):

> "The Court: But I should think it would be more likely that a person would ask for 'American' than they would ask for 'brakeblok'.
>
> Mr. Rogers: The evidence is that the other,—
>
> The Court: I know, but I was just thinking that I have no reason for disbelieving their witness who testified that people came in and asked for 'American'.
>
> Mr. Rogers: No.
>
> The Court: And call for it by its first name as distinguished from hats, as I tried to indicate to make the distinction greater".

The District Court's Application of the Law.

At pages 5, 8, and 22-23 of its petition and brief petitioner has seen fit to misquote and to do everything short of flatly accusing Judge Woolsey of an outright refusal

to follow the law as laid down by the highest Court of this land. Strangely enough even the Circuit Court of Appeals, including Judge Learned Hand, recognized as one of the greatest authorities on trademark infringement and unfair competition law of modern times, is charged with tacitly sanctioning a deliberate refusal by Judge Woolsey to follow the decisions of the Supreme Court. Two instances in the petition and supporting brief are particularly striking. At page 5 petitioner's counsel quote from page 1489 of the Record where Judge Woolsey observed that he thought the *Nu-Enamel* case was an extraordinary decision and that he would not be inclined to agree with it had it come from another Circuit, as, for example, the Seventh Circuit.

That is as far as petitioner's counsel quotes Judge Woolsey on that particular point. However, Judge Woolsey completed that very thought with the all-important statement (R. 1489):

> "I am not bound by that, *but I am bound by what the Supreme Court says, of course.*"

The second example is perhaps even more glaring. Concluding their brief, petitioner's counsel charge that Judge Woolsey refused to follow the *Nu-Enamel* case, preferring "not to 'pay any attention to that decision whatever' (R. 1489)", (Petitioner's Brief, p. 23). This is a plain distortion of part of a thought expressed by Judge Woolsey, fashioned in such a way as to completely transform and reverse the meaning of the Court's comment during the summations. The Court stated it would not pay any attention to that decision whatever, *"if it came from the Seventh Circuit"*. Far from stating that it would not pay any attention to the decisions of the United States Supreme Court, Judge Woolsey immediately interposed *"* * * but I am bound by what the Supreme Court says, of course"*, (R. 1489).

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed because manifestly it found sufficient evidence in the Record to sustain the trial court's Findings of Fact. Nevertheless, petitioner has attempted to dissect the *arguendo* discussion of the Court of Appeals and juggle the pieces as though there were no Findings of Fact upon the trial nor consideration thereof upon the appeal. At pages 2086 to 2088 of the Record the Circuit Court discusses the highlights of the evidence. After commenting on the plaintiff's *prima facie* proof, said the Circuit Court of Appeals (R. 2088):

> "* * * The testimony was nevertheless not all one way, for the defendant introduced a number of witnesses who said that they distinguished linings by the names of the manufacturers; and that to them 'brake block' meant any stiff brake lining even for passenger cars, as distinct from fabric lining. Indeed at times the plaintiff itself has thought it desirable to emphasize the adjective 'American' as by saying 'insist on *American* Brakeblok—not just "brake blocks."' Upon this evidence the judge found that the whole phrase 'American Brakeblok,' had acquired a secondary meaning and was entitled to registry under the Act of 1920, but he did not find, as the plaintiff insists that he should have done, that the words 'brake block' alone had a secondary meaning. Believing that the defendant's prefix 'National' was a plain enough distinction from the only mark which he was willing to accord the plaintiff, he dismissed the complaint.
>
> "We should scarcely feel justified in holding 'clearly erroneous' an express finding made on such

> a record that the plaintiff had not established any secondary meaning for the words 'brake block,' and in spite of the absence of an express finding we think that the judge's disposition of the case implied the equivalent of such a finding."

The learned Circuit Court of Appeals then went on to discuss the evidence most favorable to plaintiff, as though it remained unrebutted and uncontroverted. Proceeding along this line, the Circuit Court of Appeals reasoned that from the standpoint most favorable to plaintiff the evidence if it stood unassailed would merely point to the possibility of common-law unfair competition. But the Circuit Court of Appeals found there would not be unfair competition even then (R. 2090):

> "* * * Yet when an owner takes his car to the shop he does not watch it while it is being relined; or, if in rare instances he may, which does not appear, he does know what lining is put on. Ordinarily he goes away, and when he comes back, he takes the car as it is delivered to him. If a dishonest repair shop or service station has meanwhile substituted the defendant's lining, the defendant's use of the word 'brake block' has not helped him in the fraud * * * To succeed, the plaintiff was therefore bound to show that repair shops or service stations were deceived, and that it failed to do."

Finally, the Circuit Court of Appeals commented on certain evidence dragged in by the tail by plaintiff's trial counsel, namely, that the defendant's salesmen would sanction a dealer delivering National Brake Block on a call for brake block *simpliciter*. The Record establishes (R. 1315-1316, 1319) that all that the salesmen of defendant were attempting to testify to was that "brake

block'' was the common appellative for brake friction material such as that sold by the plaintiff, the defendant, and a myriad of other dealers, and that it would be perfectly proper for a service station or distributor to sell defendant's or anyone else's brake block on a call for ''brake block'' *simpliciter*. This was fatally short of a charge that the defendant, or for that matter that its salesmen, encouraged the substitution of defendant's products for plaintiff's. To be sure, certain of plaintiff's pet distributors testified upon the trial that the defendant's salesmen had so stated to them. But this was categorically denied by the salesmen under oath, and the court's Finding of Fact No. 8 (R. 29) constitutes a final, conclusive adjudication on that point and is tantamount to the trial court's adjudication that the defendant's salesmen were to be believed, and not the plaintiff's dealers. The trial court observed that proof on this subject was ''almost left at dead center'' (R. 1467). Nevertheless, disregarding *arguendo* this controverting proof, the Circuit Court of Appeals in effect stated that even had defendant's salesmen suggested passing off defendant's products for plaintiff's, there was ''no evidence to impute to the defendant'' such ''proposals'' (R. 2090).

Summary of Argument.

The Record presents nothing more than a sharply contested factual issue resolved by the trial court in favor of the defendant. In a well-reasoned opinion written by Senior Circuit Judge Learned Hand concurred in by Circuit Judges Augustus N. Hand and Charles E. Clark, it was found that there was sufficient evidence in the Record to sustain the trial court's Findings of Fact and that the trial court's Conclusions of Law properly followed.

The correctness of the Conclusions of Law is not controlled by the principal authority relied upon by petitioner upon this appeal, to wit, *Armstrong* v. *Nu-Enamel*, 305 U. S. 315, because there the case came to the United States Supreme Court with the critical finding of fact decided below in a manner exactly opposite to that upon the instant application. In other words, there had been a finding of secondary meaning in the *Nu-Enamel* case, whereas here there was a finding of *no secondary meaning*.

The application is wholly without merit, it presents no novel question not decided many times before, and it falls squarely within the rationale of *Kellogg* v. *National Biscuit Co.*, 305 U. S. 311, *Steem-Electric Corp.* v. *Herzfeld*, 7th Cir., 118 F. (2) 122, and *Germanow* v. *Standard*, 283 N. Y. 1, where, as here, judgment was granted for the defendants.

ARGUMENT.

1. *Armstrong* v. *Nu-Enamel*, 305 U. S. 315, is inapplicable because of the finding of fact by the trial court of the absence of secondary meaning of "brake block", the disputed term, affirmed by the appellate court which found adequate proof in the record to sustain the trial court's finding.

Armstrong v. *Nu-Enamel*, 305 U. S. 315, upon which petitioner places its chief reliance in this Court, turned upon the concession of the defendant there that secondary meaning had attached to the trademark in controversy. The established facts in that case evidenced a slavish imitation by defendant of the shape, color, design and dress of plaintiff's package and of plaintiff's mark, with the marketing of both products such that there was every opportunity to defraud.

At bar, to the direct contrary, secondary meaning of the term "brake block" was put in issue and thoroughly litigated and the trial court found against plaintiff as to secondary meaning*. There was ample proof that "brake block" was the proper, commonly accepted appellative of the article to which the parties applied the term (R. 30).

Not finding secondary meaning of "brake block" standing alone, the trial court invoked *Kellogg Co.* v. *National Biscuit Co., supra,* 305 U. S. 111, (R. 30). That authority compelled a determination that there was no trademark infringement by defendant, relegating petitioner to a claim of common-law unfair competition *dehors* the labeling or the name. On the question of everyday unfair business practices the trial court found on all of the evidence that respondent was guiltless (R. 29). Its finding stems from counterevidence adduced by defendant to combat every charge of unfair dealing asserted by plaintiff. For example, certain of plaintiff's distributors testified that defendant's salesmen had suggested they pass off defendant's product for plaintiff's. Apart from the credibility of plaintiff's witnesses which was in issue throughout the trial, the salesmen themselves took the stand and categorically denied the charge. Plaintiff urged that there was so striking a similarity between American Brakeblok and National Brake Block that dealers were aided in carrying out the "fraud" suggested to them by defendant's salesmen. As to this the Court found (1) that the name itself was so different that it could not assist in that alleged fraud, (2) that in any event whether the

*While defendant conceded and the trial court found secondary meaning as to "American Brakeblok," it also found complete absence of any opportunity for confusion by defendant's adoption of the name "National Brake Block," accompanied as it was by radical differences in dress of package, color scheme, printing design, etc. In the annexed Appendix we have set forth in color facsimile reproductions of the packages of petitioner and respondent to conveniently enable the Court to determine for itself that there is no imitation of, or similarity between, their visible symbols of goodwill.

suggestions had been made by the salesmen was "left at dead center" (R. 1467), (3) that their dress were utterly unlike (Appendix, *post*), and (4) that because of the manner in which the article is purveyed the name "National Brake Block" did not and could not aid in substituting for plaintiff's product defendant's or any other brand.

It should be noted that Judge Woolsey saw fit to embody in his findings those alone which were essential to a determination of the major issues, making it quite clear that to justify his ultimate conclusions several issues of fact were resolved, as necessarily they had to be, in defendant's favor. An example of this is found in Finding of Fact No. 4 (R. 29):

> "4. The plaintiff has made out a trade-name or secondary meaning, as its product, for the words '*American Brakeblok*' ".

Expressio unius, exclusio alterius. Not having stated a similar conclusion as to "brake block" the court must be deemed to have found no secondary meaning as to "brake block" *simpliciter.* Nor would the result have been different if the court had, inasmuch as National Brake Block, in name, color, design, type and dress, immediately distinguishes it from American Brakeblok.

It was clear to the Circuit Court of Appeals that Judge Woolsey had so found (R. 2088).

Absent secondary meaning, there is left merely the stereotyped cliché of tortious fraud, *i. e.*, unfair competition *dehors* trademark infringement. This renders inapplicable the law as applied in *Armstrong* v. *Nu-Enamel, supra,* and brings the case squarely within *Kellogg Co.* v. *National Biscuit Co., supra,* 305 U. S. 111, where it was held that anyone had the right to use the term by which the public knows the article. To the same effect are:

Prestonettes v. *Coty*, 264 U. S. 359
Du Pont Cellophane v. *Waxed Products*, 85 F. (2) 75; Cert. den. 299 U. S. 601
Kellogg v. *Quaker Oats*, 6th Cir., 235 F. 657
Steem-Electric Corp. v. *Herzfeld*, 7th Cir., 118 F. (2) 122
McGraw-Hill Publishing Co. v. *American Aviation Associates*, 117 F. (2) 293
Standard Paint Co. v. *Trinidad Asphalt Mfg. Co.*, 220 U. S. 446
Fawcett Publications v. *Popular Mechanics Co.*, 80 F. (2) 194.

2. Whether defendant had been guilty of unfair competition in any form *dehors* a trademark was a contested factual issue which the Court resolved in defendant's favor. There was ample proof to justify this finding. Hence certiorari will not lie to review the trial court's discretion.

The trial court's Findings of Fact, left undisturbed as they were by the Circuit Court of Appeals, stand as the established facts to which the law must be applied. *Inter alia*, it was found that the defendant had not been guilty of any form of unfair competition "whether by imitating plaintiff's packages, labels or otherwise," (R. 29). The evidence having been in conflict on this issue we assume that the United States Supreme Court will not disturb the findings, just as the Circuit Court of Appeals did not. That part of the appellate court's discussion of the facts from which petitioner has seen fit to arbitrarily disjoin random excerpts and to comment thereon so as to give them a meaning different from that which they had in their original setting,—merely constituted a review of plaintiff's case as though there had been no controverting

proof adduced by the defendant. Even from that standpoint the Circuit Court of Appeals held that there had not been a showing by plaintiff of unfair practices on the part of defendant because, firstly, the nature of the article and its merchandising is such that the consumer cannot know what article has been supplied to him and there is therefore no causal connection between the trademark and the sale of the article; and secondly, the improper sales talk plaintiff sought to attribute to defendant's salesmen was not imputable to defendant because no evidence was adduced of defendant having instigated, sanctioned or approved the same.

Petitioner's present argument that it was fraud in itself for the defendant's salesmen to sanction the delivery by dealers of defendant's product or anyone else's on a call for "brake block" *simpliciter* utterly begs the question. The Court having found on adequate evidence that there was no secondary meaning as to the term "brake block" it is futile to contend that it would be wrong to deliver defendant's product on a call for "brake block". This is the more clearly delineated by Finding of Fact No. 3 (R. 29) and Conclusions of Law Nos. 2, 3 and 5 (R. 30), that brake block is a descriptive term, *ergo* that it may properly be used to designate any article of the same kind regardless of the source of manufacture.

Equally unavailing was plaintiff's factitious "passing off" proof. Recognizing that the dress of plaintiff's and defendant's packages were radically different and not susceptible of confusion, plaintiff sent two groups of "shoppers" to various garages and automobile mechanics' establishments and service stations where National Brake Block was advertised and featured. These "shoppers" had a written note for a set of Brakeblok or calling for the relining of a set of brake shoes with Brakeblok lining. A third contingent employed by a detective agency and guided by a professional trade-mark investigator shopped

in different establishments, *but without any written order.* Instead, their story was that in each case they would ask *by word of mouth* to have a set of brake shoes relined with "American brake block" (R. 1818). Commented Judge Woolsey (R. 1017):

> "Mr. Malter: They would not know the difference no matter what we called it.
>
> The Court: That's right, but we will get this evidence in and see. *I don't think very much of it myself".*

The written order for brake block (or blakeblok) *simpliciter* begs the question as does the argument of petitioner concerning the activities of defendant's salesmen. The uselessness of the "passing off" evidence as a whole, and in particular that pertaining to the oral request for American Brake Block, is immediately apparent when it is considered that plaintiff studiously refrained from supplying its "shoppers" with a note asking for "American Brake Block" as it did in the case of "brake block" *simpliciter.* Obviously, a sincere effort to establish passing off would have suggested to plaintiff the importance of using a written note in both cases.

Apart from the serious question as to the credibility of the "passing off" witnesses, their evidence in any event contributed not a thing to plaintiff's case because:

A—There is no causal connection between the name National Brake Block and any fraud which the individual brake service station may be unscrupulous enough to practice.

B—The real consumer is the brake mechanic and the jobber who immediately know the difference between one brand and the other and cannot be misled. (Please see Appendix).

C—The individual car owner contracts to have his brakes relined and pays one composite charge therefor, only a minor percentage of which is allocated by the mechanic toward the cost of the brake friction material.

D—The proof established that it is only the rare and exceptional case for an individual car owner to ask for a specific brand of friction material.

E—In the written orders used by plaintiff's investigators the word "brakeblok" was used alone in one form or another. The trial court having found that no secondary meaning attached to "brakeblok" standing alone, instead of substantiating plaintiff's claim of "passing off" this proof instead lends force to the court's finding of the absence of secondary meaning.

Conclusion.

Secondary meaning, the critical question, the existence of which was the turning point in *Armstrong* v. *Nu-Enamel, supra,* is wholly lacking at bar; and upon conflicting evidence the trial court found as a fact that there actually had been no unfair competition on the part of defendant.

This leaves no question deserving of consideration by the United States Supreme Court and reduces the petition simply to an application to review the discretion of the trial court in resolving the disputed factual issues.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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